No. 91-676

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN W. GUMBY, SR., et al.,

Petitioners,

v.

GENERAL PUBLIC UTILITIES CORPORATION, METROPOLITAN EDISON CO., JERSEY CENTRAL POWER AND LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX, CO., McDERMOTT INC., U.E. & C.-CATALYTIC, INC., BURNS & ROE ENTERPRISES, INC., AND DRESSER INDUSTRIES, INC.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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I. INTRODUCTION

Respondents and the United States, in their briefs, spend a significant time contesting the merits of Petitioners' claims. These arguments simply highlight the significant issues raised in this petition and why this Court should grant a Writ of Certiorari. The Third Circuit's expansion of both appellate jurisdiction over remand orders and congressional authority to confer original jurisdiction over state law claims is clearly in conflict with numerous precedent of this Court and other

circuits and threatens the traditional role of the federal judiciary as courts of limited jurisdiction. This brief reply responds to the arguments opposing further review by this Court.

II. REPLY REASONS FOR ALLOWING WRIT

A. THE THIRD CIRCUIT'S APPROVAL OF APPELLATE REVIEW FOR REMAND ORDERS CREATES INTER-CIRCUIT CONFLICTS AND CONFLICTS WITH DECISIONS BY THIS COURT

The unambiguous prohibition of 28 U.S.C. §1447(d) forbidding appellate review of remand orders is collapsing. Prior to *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1975), appellate review of remand orders was considered impossible. In light of the Third Circuit's opinion, A23–A138, the limited mandamus exception in *Thermtron* to remand orders outside of the scope of 28 U.S.C. §1447(c), is now overtaking the rule and demands this Court's attention to reverse this trend. *Compare McDermott International, Inc. v. Lloyds Underwriters*, 944 F.2d 1199, 1204 (5th Cir. 1991) (Recognizing an exception under 28 U.S.C. §1291 for contractual remand orders) *with Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989) (Rejecting §1291 appeal based on a contractual forum-selection clause).

The Respondents and the United States contend that the exception created by the Third Circuit, pursuant to 28 U.S.C. §1292(b), for appellate review of the district court's remand order, neither conflicts with §1447(d) or *Thermtron*. That is not so. The language of the statute—"not reviewable on appeal or otherwise"—requires no interpretive construction. *See Demarest v. Manspeaker*, ___ U.S. ___, 111 S.Ct. 599, 604 (1991). It means what it says: no appellate review.

The Ninth and Tenth Circuits thus refuse to except from the §1447(d) prohibition certifications under §1292(b). *See In re Bear River Drainage Dist.*, 267 F.2d 849, 851 (10th Cir. 1959); *Fed. Sav. and Loan Ins. Corp. v. Frumenti*, 857 F.2d 665, 669 (9th Cir. 1988). The Fifth Circuit even refuses appellate review of remand orders for "constitutional infir-

mities," an opinion diametrically opposite that of the Third Circuit. *See Richards v. Federated Dept. Stores, Inc.*, 812 F.2d 211 (5th Cir.), *cert. denied*, 484 U.S. 824 (1987). Additionally, the Third Circuit's opinion conflicts with this Court's ruling in *Thermtron*, which requires that the remand order be outside the authority of 28 U.S.C. §1447(c) to escape the bar to appellate review. *Thermtron*, 423 U.S. at 351. This case was remanded on grounds within §1447(c), and the district court so held: "Clearly, the decision to remand the cases at bar is based on §1447(c)." (A154).

The Third Circuit's opinion is plainly at odds with other Circuit Court of Appeals' decisions, this Court's opinions, and with the long-standing Congressional intent to make the district courts the final arbiters of whether "specific actions were to be tried in a federal court." *Thermtron*, 423 U.S. at 355 (Rehnquist, J., dissenting). Because the Third Circuit's expansion of appellate jurisdiction over remand orders conflicts with the foundational underpinnings of removal jurisdiction, review of this judicial repeal of §1447(d) should be exercised.

B. THE THIRD CIRCUIT'S APPROVAL OF CONGRESSIONAL AUTHORITY TO CONFER ORIGINAL JURISDICTION OVER STATE LAW CLAIMS CONFLICTS WITH DECISIONS BY THIS COURT

The Respondents and the United States responded to this petition by defending the Third Circuit's opinion on the merits. They argue that the Price-Anderson Amendments Act of 1988 (the "Amendments") was more than a jurisdictional grant because it created an "overlay of federal law" (A91) and that the Third Circuit's opinion corresponds with *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) and *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). Petitioners disagree. These two decisions do not sustain this result and the Third Circuit's opinion bears this out. It was only with great difficulty that the majority and concurring opinions construed the only two major decisions of this Court to force their results.

The provisions referred to as the "federal overlay" existed in similar form prior to the Amendments in the Price-Anderson Act, yet that same "overlay" was previously found insufficient to create a federal cause of action. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 99 (1978)(Rehnquist, J., concurring); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 625 (1984); *Stibitz v. General Public Utilities Corp.*, 746 F.2d 993 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985); *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490 (3d Cir. 1986). The exceptions to the pre-existing overlay referred to by the Respondents and the United States are the retroactive jurisdictional grant (42 U.S.C. §2014(hh)) and the prospective-only limitation on punitive damages (42 U.S.C. §2210(s)) of the Amendments. Petitioners submit that this mere jurisdictional grant is insufficient to confer original federal jurisdiction and allow removal of state proceedings after years of litigation to a federal forum. *See Verlinden, supra*. *See also Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 508 (1900); *Shulthis v. McDougal*, 225 U.S. 561 (1912).

The tensions reflected in these arguments weigh in favor of granting certiorari. Important questions of federal law have still not been decided. Congress cannot simply state the magic words that a public liability action "arises under" federal law and satisfy the Constitutional requirements to create original federal jurisdiction. *Osborn* and *Verlinden* clearly do not dictate this result. Because both cases addressed the Article III power to confer federal question jurisdiction where uniquely federal interests, *i.e.*, the National Bank and foreign relations, existed, neither case supplies a meaningful standard where no obvious or uniquely federal interest exists. As this Court ruled in *Duke Power* that there is no such federal interest with regard to the Price-Anderson Act, the merits of this case are argued in a background devoid of precedent.

Review should therefore be granted because this Court must set a meaningful standard to define the constitutional limits of Congress's ability to confer federal jurisdiction and especially for removal of advanced state proceedings. There is an important constitutional question at stake here, which

only this Court can resolve and the issue is too important for the Court to leave unresolved.

C. CONGRESS'S RETROACTIVE APPLICATION OF THE AMENDMENTS OFFENDS THE SEPARATION OF POWERS DOCTRINE

The Amendments direct the judiciary to find that these specific cases, which were determined to be state law claims in *Duke Power*, *supra*, *Stibitz*, *supra*, *Kiick*, *supra*, are now federal claims. This contravention of the separation of powers doctrine conflicts with decisions of this Court. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 429 (1988)(Rehnquist, J., dissenting). Clearly, Congress lacks the authority to have free and unrestricted power to void state litigation in mid-stream because the state jurisdiction no longer suits the goals of a litigant. This issue is of significant national importance as evidenced by this Court's granting a Writ of Certiorari in *Robertson v. Seattle Audubon Society*, ___ U.S. ___, 111 S.Ct. 2886 (1991). Accordingly, this case should likewise be considered for review.

III. CONCLUSION

For the foregoing reasons and those set forth in Petitioner's opening brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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